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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1405

EDWIN A. WALKER,
Petitioner,

VERSUS

THE ASSOCIATED PRESS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

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April, 1968

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the
Supreme Court of the United States

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No. .....

EDWIN A. WALKER,
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THE ASSOCIATED PRESS,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals[1] for the Second Supreme Judicial District of Texas, entered in the above entitled cause on 21 July, 1967 and which became final by the action of the Supreme Court of the State of Texas in overruling, on 31 January, 1968, a motion for rehearing to its action in refusing a writ of error to said Court of Civil Appeals.

Said opinion of said Court of Civil Appeals, reported at 418 S.W.2d 379, is printed in Appendix A of the record herein.

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[1] Appendix A

By decision of this Court rendered on 12 June, 1968 reported in — U.S. —, 18 L.Ed.2d 1094, this Court, by jurisdiction invoked under 28 U.S.C. Section 1257(3), reversed the judgments of the Texas Courts and remanded the cause for further proceedings,[2] in Cause No. 150, October Term, 1965, entitled "The Associated Press, Petitioner v. Edwin A. Walker, Respondent."

JURISDICTION

The subsequent decisions of the Texas Courts misconstrued and erroneously applied the decision of this Court in No. 150 and this Court has jurisdiction to correct the order of the Texas Court . . . to avoid a construction that would attribute to this Honorable Court an intent to violate deliberately the SEVENTH AMENDMENT, by re-examining facts found by the jury.

QUESTION PRESENTED

Did this Court intend to hold that Petitioner *could not* prove a claim for damages in Libel against the Associated Press, or did it intend only to hold that he *had not* proved such a case, under substantive law that was changed on appeal to establish a new criteria of liability . . . "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." . . . an issue upon which Petitioner has never had his day in court.

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[2] Appendix B

REASONS FOR GRANTING THE WRIT

This Court reversed the judgment of the Texas Court of Civil Appeals and remanded the case to that Court for further proceedings not inconsistent with the opinions. Thereupon the Texas Court of Civil Appeals said: "In compliance with the judgment and mandate of the Supreme Court, we hereby set aside our prior judgment of affirmance and hereby reverse the judgment of the Trial Court and *render judgment that General Walker recover nothing* from the Associated Press." Despite the crucial issues involved, the Supreme Court of Texas disposed of an appeal without an opinion, and by a single word . . . "OVERRULED."[3]

Neither that Court on rehearing nor the Supreme Court of Texas would alter this judgment to permit further trial upon the merits under the new standards of liability created for the first time by this Court's decision.

We respectfully submit that the action of the Texas Court of Civil Appeals has misconstrued this Court's directions remanding the case "for further proceedings not inconsistent with the opinions that have been filed herein." Mr. Justice Harlan's opinion stated that this Court would face for itself "the question whether there is sufficient evidence to support the finding we would require," and concluded that there was not. When the evidence is insufficient, and the substantive rules of liability have been changed on appeal, the cause should be remanded for further trial. Particularly is that true when Mr. Justice

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[3] As more fully appears from copy of Second Petition for Rehearing, Appendix C.

Harlan's opinion expressly states that this is a case of first impression, as to whether to extend the protection of the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, to persons who are not public officials, but who are public figures and involved in issues in which the public has a justified and important interest, recognizing that the question had been expressly reserved and not decided in *New York Times*. Particularly is that true when the basic criteria of liability had been changed to apply a "hot news" concept to Walker's case, with an entirely new standard . . . "severe departure from accepted publishing standards."

Recognizing that the rules had been changed in the middle of the game by the decision in *New York Times*, this Court remanded for new trial in *Rosenblatt* v. *Baer*, 383 U.S. 75, 15 L.Ed.2d 597.[4] Mr. Justice Brennan's opinion concludes with the statement, "because the trial here was had before NEW YORK TIMES, we have concluded that *we should not foreclose him from attempting re-trial of his action.*" To paraphrase, because the trial here was had before *New York Times* had been extended to persons who are not public officials, and before creation of the "accepted Publishing Standards" concept, this Court should not foreclose Walker from re-trial of his action in the light of the rules and principles enunciated by this Court in its former decision herein. Should not Equal Justice Under Law require the same rule to be applied to Walker?

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[4] See also: *Hodges* v. *Easton*, 106 U.S. 408; *Martinton* v. *Fairbanks*, 112 U.S. 670; *Marconi* v. *Simon*, 246 U.S. 46; *Sioux City Bridge Co.* v. *Dakota*, 260 U.S. 441; *Villa* v. *Van Schaick*, 299 U.S. 152; *Peterson* v. *Alabama*, 294 U.S. 600.

When Walker tried his case, "Severe departure from accepted publishing standards" was unheard of in the Law of Libel, and it was not necessary for a private citizen to show malice in order to recover for vilification. Although he pleaded for exemplary damages requiring malice, he made no effort to show malice except as it incidentally appeared from deliberate distortion and indifference to the truth, as part of his cause of action for punitive damages. This Court recognized that it was breaking new ground when it first decided in his case that the *New York Times* doctrine applied to a private citizen who by his career or his accomplishments was a public figure.

Therefore, in an elemental spirit of fairness and justice, when it has, since his trial, become necessary that he show both malice, and "sever departure from accepted publishing standards," he should be given the opportunity to establish his case under the new rules, and should not be foreclosed from attempting re-trial of his action.

If denied his day in court, then it is implicit in the Court's holding that his identity and public statements have made him ineligible for Equal Justice Under Law, contrary to the often stated philosophy that all are equal under the law. See *Communist Party of U. S.* v. *Subversive Activities Control Board*, 367 U.S. 1 (p. 137):

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country."

CONCLUSION

It is respectfully submitted that this Court's mandate . . . reversing the Texas Court "for further proceedings not inconsistent with the opinions filed herein." . . . in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, *as accord with right and justice, and the Constitution and laws of the United States* . . . has been grossly misinterpreted by the Texas Courts to accomplish an oppressive miscarriage of justice. It would seem that further proceedings, as accord with right and justice, would afford Petitioner his day in court to prove the elements of substantive law as announced for the first time by this Honorable Court in its opinions reversing the Texas Court, rather than a simple denial of judgment to Petitioner.

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of Counsel:
WATTS, LOONEY, NICHOLS & JOHNSON

April, 1968

APPENDIX A

RECEIVED
Jul 24 1967
Wm. Andress, Jr.
Dallas, Texas

NO. 16624

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

THE ASSOCIATED PRESS — APPELLANT

VS.

EDWIN A. WALKER — APPELLEE

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

On July 30, 1965, this Court affirmed a judgment of the trial court in which General Walker had been awarded judgment against The Associated Press in a libel action. Associated Press v. Walker, 393 S. W. 2d 671 (writ ref. n.r.e.).

Subsequently, the case was brought before the Supreme Court of the United States by virtue of a writ of certiorari.

On June 12, 1967, the Supreme Court concluded that General Walker was not entitled to damages from The Associated Press. The judgment in favor of General Walker was reversed and this Court was instructed to act in conformity with the judgment of the Supreme Court. Associated Press v. Walker, — U.S. —, — L.Ed.2d 1094.

In compliance with the judgment and mandate of the Supreme Court, we hereby set aside our prior judgment of affirmance and hereby reverse the judgment of the trial court and render judgment that General Walker recover nothing from The Associated Press, and that The Associated Press recover from Edwin A. Walker all costs as per mandate of the Supreme Court.

Per Curiam

APPENDIX B

RECEIVED
Jul 27 1967
Wm. Andress, Jr.
Dallas, Texas

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Court of Civil Appeals of the State of Texas, Second Supreme Judicial District,

(Seal)

GREETINGS:

WHEREAS, lately in the Court of Civil Appeals of the State of Texas, Second Supreme Judicial District, there came before you a cause between The Associated Press and Edwin A. Walker, No. 16624, wherein the judgment of the said Court of Civil Appeals was duly entered on the 30th day of July A. D. 1965, as appears by an inspection of the transcript of the record of the said Court of Civil Appeals which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1966, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record and was argued by counsel.

ON CONSIDERATION WHEREOF, it was ordered and adjudged on June 12, 1967, by this Court that the judgment of the said Court of Civil Appeals in this cause be reversed with costs, and that this cause be remanded to the Court of Civil Appeals of the State of Texas, Second Supreme Judicial District, for further proceedings not inconsistent with the opinions filed herein.

* * * * * *

IT WAS FURTHER ORDERED that The Associated Press recover from Edwin A. Walker Eight Thousand Six Hundred and Sixty Dollars and Forty-eight Cents ($8660.48) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness the Honorable EARL WARREN, Chief Justice of the United States, the seventh ____ day of July ____ in the year of our Lord one thousand nine hundred and sixty-seven.

Costs of The Associated Press:

Clerk's costs	$1448.64
Printing of record	7211.84
	$8660.48

Clerk of the Supreme Court of the United States

No. 150 October Term, 1966

The Associated Press,

v

Edwin A. Walker

APPENDIX C

NO. B-538

IN THE SUPREME COURT OF THE STATE OF TEXAS

EDWIN A. WALKER,

PETITIONER,

vs.

THE ASSOCIATED PRESS,

RESPONDENT.

SECOND PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Petitioner, Edwin A. Walker, respectfully moves the Court to set aside its Order of January 31, 1968 overruling Petitioner's Motion for Rehearing in this cause, without an Opinion, and requests the Court to grant this Second Petition for Rehearing; and, upon consideration thereof, to writ a formal Opinion recognizing the vital issues presented to the Court in this cause, and stating the causes and precedent which impel the Court to its final conclusion.

On behalf of a party who, in World War II, and Korea, served his country, faithfully, valiantly and effectively, counsel would perform less than their duty if they failed to suggest, respectfully, to this Honorable Court that the vital issues presented in this cause have not adequately been adjudicated by a single word . . . "OVERRULED."

The sole remaining issue raised by Petitioner in his Second Petition for Rehearing is a request that this Honorable Court prepare and issue a written Opinion covering the questions of law and fact involved in this cause, before denial of Petitioner's Application for Certiorari.

With such an Opinion, following established precedent, and openly adjudicating the issues before this Honorable Court, Petitioner will have had his day in Court.

Regardless of the outcome, Petitioner would then accept the final judgment, feeling that his rights had been weighed in the Scales of Justice by the Court of Last Resort in his home state, charged with such responsibility. Final adjudication of a case of this importance, without an Opinion, even though a speedy and effective solution of a troublesome problem, would be less than a full realization of Petitioner's Legal Rights.

Throughout this litigation, we have endeavored respectfully to point out to various Courts, and juries, that principles are involved which transcend in importance the identity of the parties themselves.

A challenge from the pen of Gill Rob Wilson, spokesman for the World War I Aviator, as our country entered the Air Age, becomes increasingly pertinent with our troubled entry into the Space and Nuclear Age:

> "Once again, conflicting ideologies are locked in desperate rivalry for the key to human destiny."

To hold this rivalry upon an ideological plane, much effort has been expended to advance a concept of PEACE UNDER LAW; but, to be viable, this LAW must provide EQUAL JUSTICE FOR ALL.

In the instant case, Petitioner was accused falsely by the Respondent of the commission of a crime. As a direct and proximate result of the accusation,[1] Petitioner was arrested, committed by a federal magistrate to custody of a U. S. Marshal in Mississippi, taken without a court order, and only upon authority of a telegram from the Director of Prisons, from the custody of that Marshal and transported across State lines to a Missouri federal hospital for criminal insane, there falsely imprisoned for six gruesome

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[1] See attached copy of Criminal Complaint, wherein Associated Press Newsman, Savell, is purported to have furnished the information upon which the Complaint was based.

days and nights amid an atmosphere of criminal insanity, and, on the following day, committed by an Order, entered without notice, counsel or hearing, solely upon an Affidavit by a federal psychiatrist who had never seen him, but had "carefully read news reports."

Petitioner's efforts to obtain legal redress for this wrong have foundered upon a judicial reef of changing concepts of Libel, which has relieved Associated Press from liability upon the ground that its report constituted "hot news" that "did not give the slightest hint of a severe departure from accepted publishing standards."

Even though this rule of Substantive Law is a "severe departure" from previously accepted concepts of the Law of Libel, Petitioner is now being deprived of his final day in court to prove that the defamatory report by Associated Press (already branded by a jury as FALSE, NOT FAIR COMMENT, and NOT PUBLISHED IN GOOD FAITH AS THE HONEST OPINION OF THE WRITER) is a severe departure from accepted publishing standards, and was not "hot news," having been published three days after the alleged incident.

In the past, Petitioner has followed, by reason of training and conviction, concepts of Duty, Honor, Country, by which American Servicemen must be motivated to serve above and beyond the Call of Duty as a Way of Life, in order to meet upon the farflung battle line those who challenge the survival of our country.

The question now squarely before this Honorable Court is the measure of the rights which those who serve in time of war may reasonably expect in time of peace from the Courts of the land which he has defended, and which others trained under him must continue to defend with their lives and sacred honor.

The attention of the Court is respectfully invited to the briefs heretofore filed, in the hope that this last appeal may indicate that the issues therein raised are worthy of

a formal opinion, before Petitioner is finally held to be without a remedy for the grievous wrong he has suffered.

It is respectfully submitted that, in the present posture of this cause, with Petitioner seeking a judicial evaluation of vital issues, he has not realized fulfillment of his rights by the simple Order . . . "OVERRULED."

Respectfully submitted,

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[APPENDIX]

FILED IN EVIDENCE
IN SUIT NO. 160536
OCT 18 1965
(Name illegible)
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION

Commissioner's Docket No. 1
Case No. 61

UNITED STATES OF AMERICA	)	COMPLAINT for
	)	VIOLATION OF
v.	)	U.S.C. Title 18
EDWIN WALKER	)	Sections 111, 372, 2383,
	)	and 2384

BEFORE Omar D. Craig, Oxford, Mississippi.

The undersigned complainant being duly sworn states:

That on or about September 30, 1962, at Lafayette County, in the Northern District of Mississippi, Edwin Walker did forcibly assault, resist, oppose, impede, intimidate, and interfere with United States marshals and persons employed to assist such marshals, the marshals being a class of persons designated in Section 1114, Title 18, United States Code, while engaged in the performance of their official duties, in violation of Section 111, Title 18, United States Code;

That said defendant and other persons unknown in the state of Mississippi, did conspire to prevent by force, intimidation, and threats United States Marshals from discharging their duties and to injure them in their person while engaged in the lawful discharge of the duties of their office, in violation of Section 372, Title 18, United States Code;

That said defendant did incite, assist, and engage in an insurrection against the authority of the United States and the laws thereof, in violation of Section 2383, Title 18, United States Code;

That said defendant and other persons unknown in the state of Mississippi, did conspire to and oppose by force the authority of the United States and by force to prevent, hinder, and delay the execution of the laws of the United States, in violation of Section 2384, Title 18, United States Code.

And the complaint states that this complaint is based on information and belief *on the basis of information obtained from Van H. Savell.*

/s/ H. M. Ray
United States Attorney

Sworn to before me, and subscribed in my presence, October 1, 1962.

/s/ Omar D. Craig
United States Commissioner

CERTIFICATE OF COUNSEL

A copy of foregoing Second Petition for Rehearing mailed this 5th day of February, 1968 to Cantey, Hanger, Gooch, Cravens & Scarborough, Attorneys for Respondent, First National Bank Bldg., Ft. Worth, Texas 76102.

C. J. Watts

CLYDE J. WATTS.